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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Eye On ERISA: Q&A With Goodwin Procter's James Fleckner

By **Emily Brill**

*Law360 (February 1, 2019, 8:19 PM EST)* -- James Fleckner, the chair of Goodwin Procter LLP's ERISA litigation practice, is currently riding high off a big win for his client American Century Companies Inc., for whom the firm recently secured dismissal of an Employee Retirement Income Security Act class action concerning proprietary funds in 401(k) plans.

James Fleckner

The Boston-based attorney is also looking toward a future in which courts have decided whether fiduciaries should apply a paternalistic approach to managing 401(k) plans. He says courts' competing views on this issue create a tension that underlies many ERISA lawsuits and leads to confusion for plan managers.

A graduate of University of Connecticut's law school, Fleckner has spent more than three-quarters of his 21-year legal career working on benefits cases, and he has headed up Goodwin's ERISA litigation practice for about a decade.

This interview has been edited for length and clarity.

**What has your practice been up to lately?**

We learned on Jan. 23 that the chief judge of the Western District of Missouri granted judgment in full to our client American Century. This was a case that challenged the use of mutual funds in the American Century 401(k) plan.

There have been a couple dozen other suits against asset managers like American Century who've used their own funds for their own 401(k) plans. Of the couple dozen suits that have been brought against these asset managers within the past decade ... this is the first one that had a full trial.

**Tell me about the precedent this set.**

What the judge held was, effectively, that if the fiduciaries are conscientious and thoughtful in their approach to the employee benefits they're responsible for, there's no one set of procedures that they need to follow.

There's no requirement that a certain type of fund be used as opposed to another type of fund. There's no requirement that only a certain number of investment choices be provided to participants.

Fiduciaries should have latitude to make judgments they feel are reasonable for their plan. There's no cookie-cutter approach to how benefits should be provided.

**What's the best thing to come out of this ruling for fiduciaries and employers?**

That employers and fiduciaries have latitude to design plans the way they feel is most appropriate for their participants. For example, the plaintiffs had argued that a defined-contribution plan must include index funds, and the court rejected that. Active management can add value for participants.

There's a lot in this decision to inform fiduciaries, and hopefully to act as a guide for other courts looking at similar challenges that plaintiffs' lawyers are making across the country.

**What's another issue affecting ERISA litigation that you would like to see the appellate courts resolve?**

ERISA applies to defined-contribution plans, but it was designed to address a world in which people received retirement benefits through pension plans. There was no 401(k) in the Internal Revenue Code in 1974. I think a lot of the situations that we see manifesting themselves in the courts, at least with respect to defined-contribution plans, flow from the fact that ERISA is a statute that was designed for a different era.

In particular, I think courts wrestle with whether the statute is or should be paternalistic when it applies to defined-contribution plans. Many courts recognize that participant choice in a 401(k) plan is a good thing. The idea of a 401(k) plan is to empower employees to make their own decisions for themselves for their retirement. But some courts apply a more paternalistic view to the statute, which in some ways is understandable, given its roots as a statute that addresses the defined-benefit world — a much more paternalistic type of plan.

But the courts need to come to grips with the fact that 401(k) plans are empowering employee choice, and an overly paternalistic approach can run counter to the goals of 401(k) plans. That unresolved tension in the statute and its interpretation in the courts is really fundamental to a lot of different issues that arise.

**Do you think that's something Congress would address?**

We're coming off the longest government shutdown ever. I'm sometimes skeptical about the ability of Congress to make changes.

Not everything in ERISA is favorable to participants, and not everything is favorable to employers, but it passed nearly unanimously thru Congress [in 1974] and was signed by a Republican president. It's hard to envision that type of bipartisan diligence in what we see in Washington today.

**As the ERISA litigation practice chair, what do you look for when hiring an ERISA litigator?**

Intellectual curiosity. This is a complex statutory structure, and I think it's important to find attorneys who are willing to roll up their sleeves and dig in to help solve puzzles.

It's also important in the legal profession for all of us to be very mindful of the benefits of diversity and inclusion. You get the best outcome when you have people with diverse perspectives looking at a problem. It's important to me that we're getting a real representation of people with different

perspectives and backgrounds.

**What kinds of skills do you think a person needs to be a good benefits attorney?**

The Supreme Court has called ERISA a comprehensive and reticulated statute, so I think attention to detail is important. You also need somebody who can approach problems from a practical perspective. I think you can spend a lot of time in the weeds, and it's important to understand the detail and get into the weeds, but it's also important to understand the practical implications for how fiduciaries and employers manage their plans and benefits.

--Editing by Emily Kokoll.